In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1311

ROBERT L. BURNETT, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A–11) is reported at 433 F. 2d 1386. The initial opinion (Pet. A–1—A–8) and order (Pet. App. A–9) of the district court are not yet reported. The final order of the district court, a copy of which is annexed hereto, is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A–10) was entered on November 23, 1970. A petition for rehearing was denied (Pet. App. A–13) on December 18, 1970. The petition for a writ of certiorari was filed on February 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

419-023—71——1

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 460(b)(3)) precludes pre-induction judicial review of a local board denial of a claim to a medical deferment.

STATEMENT

Petitioner seeks pre-induction judicial review of the refusal of his local board to grant him a I-Y deferment from military service for medical reasons.

In May 1969, petitioner, then holding a student (II-S) classification, submitted to his local board certain medical records and statements in support of his claim that the condition of his right knee disqualified him for military service (Pet. App. A-2). Thereafter, in early September, he notified his board that he had graduated from college, and, on September 8, he was ordered to report for a pre-induction physical examination on September 17. Two days before the scheduled examination, petitioner requested that the local board grant him a medical interview under 32 C.F.R. 1628.2(b) (Pet. App. A-2); the board declined to do so, and, on September 17, classified him 1-A (Pet. App. A-3). On the same day, petitioner reported for and took the scheduled pre-induction physical examination as earlier ordered (Pet. App. A-3).

On receipt of his I-A classification, petitioner requested an appointment with a government appeal agent and a personal appearance before the local board. Both requests were granted (Pet. App. A-3); on November 13, 1969, he appeared before one board

member and was advised that he would not be ordered to report for induction until the board received the results of his pre-induction physical examination. (Pet. App. A-4). On November 18, 1969, petitioner was again classified I-A (Pet. App. A-4).

The results of petitioner's physical examination were submitted to the board on December 12, 1969; the armed forces examining doctors found him qualified for military service (Pet. App. A-4). On December 16, petitioner filed a timely appeal from his I-A classification, and his complete file, including the results of the physical examination, was forwarded to the State Appeal Board; the appeal board, by unanimous vote, classified him I-A (Pet. App. A-5). On March 23, 1970, petitioner was ordered to report for induction on April 15; prior to the reporting date he instituted this action seeking pre-induction judicial review of his classification.

The district court, on May 21, 1970, enjoined induction until the local board afforded to petitioner a medical interview, as required under 32 C.F.R. 1638.2 (b) (Pet. App. A-1, A-9). The interview was held by the board's medical adviser on June 1, 1970;[1] he found petitioner physically qualified for military service, and so advised the board (p. 8, *infra*). The board then itself determined that petitioner did not have a condition disqualifying him for military service, and ordered that he report for induction (p. 8, *infra*).

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[1] An earlier interview had been held on May 8, 1970, but this interview did not meet the standards set by the district court.

Subsequently, the district court, by order of June 7, 1970 (pp. 7-8, *infra*), denied registrant's motion for a permanent injunction against induction, holding that both the medical adviser who had conducted the June 1 interview and the local board had now properly "determined" that the registrant did not have "disqualifying medical conditions or physical defects" (p. 8, *infra*).

On appeal to the Fifth Circuit, the court below held: "Without evaluating the merits of Barnett's claim, we conclude that the District Court had no jurisdiction to entertain his demand for pre-induction judicial review. 50 USCA App. § 460(b)(3) * * *" (Pet. App. A-11—A-12).

ARGUMENT

Petitioner's suit was barred under Section 10(b)(3), which precludes "judicial review * * * of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." See *Clark v. Gabriel*, 393 U.S. 256.

The narrow exception to that general principle, enunciated by this Court in *Oestereich v. Selective Service Board*, 393 U.S. 233, and reaffirmed in *Breen v. Selective Service Board*, 396 U.S. 460, has no application to the present suit. Both those cases involved a "clear departure by the Board from its statutory mandate" (*Breen v. Selective Service Board*, 396

U.S. at 407); since the assigned classification was wrong as a matter of statutory law, the question whether it could as a factual matter be sustained under the "basis in fact" test was never reached. That question remains reserved for post-induction judicial review. *Oestereich* v. *Selective Service Board*, 393 U.S. at 238; *Clark* v. *Gabriel*, 393 U.S. 256.

Here the essence of petitioner's claim is that he is entitled to a medical deferment on the basis of evidence he had submitted to his local board, notwithstanding that he was found qualified for military service both by the doctor who conducted his armed forces physical examination and by the local board's medical advisor who, under court order, afforded him the requisite medical interview. That raises only a question which "inescapably involves a determination of fact and an exercise of judgment" (*Clark* v. *Gabriel*, 393 U.S. at 256) and thus must await resolution in a suit brought after petitioner has responded either affirmatively or negatively to an order to report for induction. See *Boebout* v. *Thomas*, 420 F. 2d. 1343 (C.A. 9); *Sloan* v. *Selective Service Board No. 1, Bernalillo County, N.M.*, 414 F. 2d 125 (C.A. 10); *Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (C.A. 5).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

APPENDIX

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Texas

Beaumont Division

Civil Action No. 6649

Robert L. Bennett, Jr.,

v.

United States of America, et al.,

(Filed: June 7, 1970)

ORDER OVERRULING PLAINTIFF'S MOTION FOR CONTINUING INJUNCTION

This day came on to be considered by the Court the motion of plaintiff to restrain and enjoin the above named defendants, and especially Selective Service Board No. 74, from inducting the plaintiff and continuing the preliminary injunction entered by this Court on May 21, 1970; and it appearing to the Court:

1. That, by order of this Court entered on May 21, 1970, defendant Selective Service Board was preliminarily enjoined from inducting the plaintiff and was ordered to accord the plaintiff a Medical Interview without regard to any Armed Forces Physical Examination which may have been conducted, said preliminary injunction having been based upon findings of fact and conclusions of law filed contemporaneously with the entry of such injunction, and which findings of fact and conclusions of law are made a part hereof by reference;

2. That defendant Selective Service Board, in accordance with Title 32, C.F.R., section 1628.1, referred plaintiff to Dr. P. T. Petitt, M.D., Beaumont, Texas, for a Medical Interview on June 1, 1970;

3. That plaintiff presented himself to such physician, who examined plaintiff in the manner he deemed necessary and reviewed the materials submitted to him by the defendant Selective Service Board, which materials included only letters and affidavits submitted by plaintiff;

4. That such physician determined, and so advised the defendant Selective Service Board, that plaintiff did not have the disqualifying medical conditions or physical defects which appear in the list described in Title 32 C.F.R., section 1628.1;

5. That the defendant Selective Service Board afterwards determined that plaintiff did not have such disqualifying medical conditions or physical defects which appear in the list described in section 1628.1;

6. That defendant Selective Service Board has ordered plaintiff to report for induction on June 10, 1970;

7. That in conducting the medical interview with plaintiff, Dr. Petitt was not acting in a quasi-judicial capacity but, instead, was acting in a professional capacity, in order to evaluate plaintiff's claims and contentions and to render professional advice to such defendant Selective Service Board; accordingly it is

ORDERED that plaintiff's said motion shall be, and it is hereby, DENIED. It is further ORDERED that this order shall constitute the finding of fact and conclusions of law of the Court with respect to plaintiff's said motion. SIGNED and ENTERED this 7th day of June, 1970.

WM. WAYNE JUSTICE,
United States District Judge.